

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JENNIFER L. TOBIN, as Administratrix of  
the Estate of G. M. T., deceased, JENNIFER  
L. TOBIN and CHRISTOPHER M. TOBIN,  
individually and the marital community  
composed thereof, and as the parents of I. T.,  
their minor child,

Plaintiffs,

v.

THE STATE OF WASHINGTON, VICTOR  
BERDECIA, in his individual capacity, and as  
an employee of The State of Washington,  
AMY CICHOWSKI, in her individual  
capacity, and as an employee of The State of  
Washington, MARY KAY QUINLAN, in her  
individual capacity, and as an employee of The  
State of Washington, EAVANNE  
O'DONOGHUE, in her individual capacity,  
and as an employee of The State of  
Washington, and "JOHN DOE," and "JANE  
DOE" 1-10, in their individual capacities, and  
as an employees of The State of Washington,

Defendants.

Case No. C06-5630RJB

ORDER

This matter comes before the Court on Defendants' Motion for Summary Judgment (Dkt. 41),  
Defendants' Motion to Strike (Dkt. 61), Plaintiffs' Motion for Partial Summary Judgment Re:  
Parental Liability/Immunity; Contributory and/or Comparative Fault of a Minor Below the Age of 6

1 and Allocation of Fault Pursuant to RCW 4.22.070 (Dkt. 44), and Plaintiffs' Motion for Late Filing of  
2 Exhibits #1-#4 of Declaration of Paul A. Lindenmuth re: Plaintiffs' Motion for Summary Judgment  
3 Allocation of Fault to Lisa Fish (Dkt. 66). The Court has considered the pleadings filed in support of  
4 and in opposition to the motions and the file herein.

## 5 **I. PROCEDURAL AND FACTUAL BACKGROUND**

6 This case involves the tragic drowning death of a child while at daycare. Dkt. 1-3, at 11-37.  
7 Pursuant to General Order for the Court Regarding Public Access to Electronic Case Files (filed  
8 5/29/03) this opinion will refer to the minor child as G. M. T. The following relates the licensing  
9 history of the in-home daycare where the child was on the day of the incident and the circumstances of  
10 his death.

### 11 **A. LICENSING OF THE DAYCARE**

12 Parties agree that in 2001, Defendant Amy Cichowski, a former Washington State Department  
13 of Social and Health Services ("DSHS") employee, conducted an in-home daycare licensing inspection  
14 of Lisa Fish's residence. Dkt. 42, at 42-58. The residence is located at 6408 South Island Drive,  
15 Bonney Lake, Washington. *Id.* at 42. The back of the residence was fenced, and Fish was told that  
16 extra fencing was required in order to become licensed. Dkt. 59-8, at 51-52. Fish installed the  
17 additional fencing in the back. *Id.* The front yard is unfenced. *Id.*, at 52. Parties also do not dispute  
18 that across the street and behind another row of homes is a body of water known as Lake Tapps.  
19 Parties do not dispute that Lake Tapps is visible from the front porch of the Fish residence. According  
20 to Fish, she and Defendant Cichowski did not discuss fencing the front yard to prevent the children  
21 from accessing Lake Tapps. Dkt. 59-8, at 52. On December 11, 2001, the proposed daycare was  
22 given an in-home daycare license for the care of 6 children. Dkt. 59-4, at 2. Plaintiffs urge that the  
23 daycare was not in compliance with then applicable Washington Administrative Code ("WAC") 388-  
24 155-295(5) which provides, "[a] five foot high fence with gates, locked when not in use, is required to  
25 prevent access to water hazards, such as swimming pools, lakes, streams, or natural or artificial  
26 pools."

27 Parties also agree that in March of 2004, Defendant Victor Berdecia, also a Washington State  
28 DSHS employee, conducted an inspection to determine if Fish's in-home daycare license should be

1 renewed. Dkt. 59-8, at 52. According to Fish, Defendant Berdecia told her that she had to keep the  
2 front door of the residence unlocked. *Id.* Fish's front door has a door knob, with no lock, a dead bolt,  
3 and a security screen door. *Id.* The record is unclear as to whether Fish was aware that G. M. T. was  
4 able to open the deadbolt prior to the incident. *Id.* at 52, 72, 81. Fish states that she and Defendant  
5 Berdecia did not discuss fencing the front yard to prevent the children from accessing Lake Taps. *Id.*  
6 at 63. Parties agree that Fish's license was renewed.

7 Parties agree that Defendant Mary Kay Quinlan was Defendant Cichowski and Berdecia's  
8 supervisor. Dkt. 59-11, at 28-29. Defendant Eavanne O'Donoghue is the supervisor of the Child  
9 Protective Services investigator, Ruben Reeves, who investigated G. M. T's death. Dkt. 59-11 at 5-8.  
10 This opinion will refer to Quinlan, Cichowski, Berdecia and O'Donoghue collectively, as the named  
11 Defendants.

## 12 **B. G. M. T.'s DEATH**

13 On July 13, 2004, G. M. T. was doing puzzles and watching television with two other children  
14 in the front room of the daycare. Dkt. 59-8, at 54. Fish left the front room and went into the  
15 backyard to address an altercation between two other children. *Id.*, at 55. She estimates that she was  
16 gone between five to ten minutes. *Id.* Fish stated that, despite Defendant Berdecia's requirements,  
17 she had the front door's deadbolt engaged (locked). *Id.* at 58. Parties do not dispute that G. M. T.  
18 (who was around two years old at the time) apparently left the Fish residence, crossed the unfenced  
19 front yard, crossed the street and the neighbor's yard, to Lake Tapps where he drowned. *Id.*, at 55-  
20 80. Lisa Fish voluntarily closed her day care. *Id.* at 49.

## 21 **C. PROCEDURAL HISTORY**

22 G. M. T.'s parents and sibling filed a Complaint in Pierce County Superior Court on October  
23 10, 2006. *Id.* at 11-37. They make a: 1) negligence claim, 2) 42 U.S.C. § 1983 claim based upon a  
24 violation of their Substantive Due Process rights guaranteed by the Fifth and Fourteenth Amendment,  
25 3) wrongful death claim pursuant to RCW 4.24.010, 4) 42 U.S.C. § 1983 claim based upon a wrongful  
26 death, and 5) an emotional distress claim. Dkt. 1-3, at 33-34.

27 Defendants removed this case on October 27, 2006, citing 28 U.S.C. §§ 1331 and 1343 as the  
28 basis for this Court's jurisdiction. Dkt. 1-1. Plaintiffs moved for an Order of Remand to Pierce

1 County Superior Court. Dkt. 13-1. Plaintiffs argued that pursuant to 28 U.S.C. § 1441(c), this Court  
2 had discretion to remand the entire action if state law claims predominate. Dkt. 11-1, at 6. Plaintiffs  
3 argued that although the “42 U.S.C. § 1983 claim is predicated on federal law, a substantial **amount**  
4 **of the evidence will be predicated on an exploration of state, statutory, and regulatory law.**  
5 Thus even though it is a federal claim, state law issues will predominate.” Dkt. 11-1, at 9 (*emphasis in*  
6 *original*). Plaintiffs alleged that two provisions of the WAC are implicated in the federal claim, WAC  
7 388-155-295 (regarding water safety requirements for a daycare), and WAC 388.295-520(4)  
8 (regarding monitoring at the entrances and exits of a daycare), and so the matter should be remanded.  
9 Dkt. 11-1, at 3-5. Plaintiffs’ motion to remand was denied due to the 42 U.S.C. § 1983 claim. Dkt.  
10 17.

#### 11 **D. PENDING MOTIONS**

12 Defendants move for summary judgment on Plaintiffs’ federal and state claims. Dkt. 41.  
13 Defendants argue that: 1) pursuant to the Eleventh Amendment they are immune from suit, 2)  
14 Plaintiffs’ § 1983 claim should be dismissed because no constitutional violation occurred, and even if it  
15 did they are entitled to qualified immunity, 3) Plaintiffs’ state law negligence claims should be  
16 dismissed, and 4) Plaintiffs’ state law outrage claim should be dismissed. *Id.* Plaintiffs’ oppose the  
17 motion, and as to their federal claims, argue: 1) their due process rights were violated and so their §  
18 1983 claim should not be dismissed, 2) Defendants are not entitled to qualified immunity. Dkt. 54.  
19 Defendants reply, arguing that : 1) no constitutional violation occurred, and even if it did they are  
20 entitled to qualified immunity, 2) there is no supervisor liability where there is no constitutional  
21 violation. Dkt. 61. Plaintiffs oppose dismissal of their state law claims, arguing that: 1) the  
22 negligence claims fall within a number of exceptions to the public duty doctrine, 2) Plaintiffs have valid  
23 claims for negligent retention and supervision, and 3) Plaintiffs have a claim for reckless and/or  
24 negligent infliction of emotional distress. Dkt. 56. Defendants reply, arguing that: 1) the public duty  
25 doctrine precludes liability, 2) there is no claim for negligent supervision under these facts, and 3)  
26 negligent infliction of emotional distress is not at issue here because this case is not based on the  
27 common law. Dkt. 60.

28 Defendants move to strike the Declarations of Plaintiffs’ counsel, including all attachments.

1 Dkt. 61. Plaintiffs filed a Surreply to Defendants' motions to strike, moving that the Declaration at  
2 issue be treated as a statement of facts. Dkt. 68.

3 Plaintiffs move for Partial Summary Judgment re: parental liability/immunity, contributory  
4 and/or comparative fault of a minor below the age of 6, and allocation of fault pursuant to 4.22.070.  
5 Dkt. 44. Plaintiffs argue that: 1) under Washington law Christopher and Jennifer Tobin should be held  
6 not to have caused or contributed to their son's death, 2) G. M. T. cannot be held liable for his own  
7 death, and 3) Fish is not a party who can be assigned or apportioned fault. Dkt. 44-2. Defendants  
8 argue that: 1) Defendants do not have any intention of assigning any fault to Christopher Tobin,  
9 Jennifer Tobin, or G. M. T., and 2) Fish is the "entity at fault" in G. M. T.'s death under 4.22.070.  
10 Dkt. 51. Plaintiff replies, 1) Lisa Fish's proportionate responsibility for G. M. T.'s death is, at most  
11 slight, and 2) Fish is not an entity that can be taken into account for RCW 4.22.070 purposes due to  
12 her bankruptcy. Dkt. 63.

13 On October 22, 2007, Plaintiffs filed a Motion for Late Filing of Exhibits #1-#4 of Declaration  
14 of Paul A. Lindenmuth re: Plaintiffs Motion for Summary Judgment Allocation of Fault to Lisa Fish.  
15 Dkt. 66.

## 16 **II. DISCUSSION**

### 17 **A. SUMMARY JUDGMENT STANDARD**

18 Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and  
19 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any  
20 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
21 The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a  
22 sufficient showing on an essential element of a claim in the case on which the nonmoving party has the  
23 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of  
24 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the  
25 non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)  
26 (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical  
27 doubt."); *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
28 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve

1 the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W.*  
 2 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The court must  
 4 consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a  
 5 preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*,  
 6 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving  
 7 party only when the facts specifically attested by that party contradict facts specifically attested by the  
 8 moving party. The nonmoving party may not merely state that it will discredit the moving party’s  
 9 evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
 10 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in  
 11 affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497  
 12 U.S. 871, 888-89 (1990).

### 13 **B. ELEVENTH AMENDMENT IMMUNITY**

14 Defendants first argue that pursuant to the Eleventh Amendment, the state, its agencies and  
 15 Defendants named in their official capacities have absolute immunity from suit for damages under 42  
 16 U.S.C. § 1983. Dkt. 41, at 8. Plaintiffs respond by conceding that the federal claims (42 U.S.C. §  
 17 1983 claims) can not be brought against the State, or its agencies. Dkt. 54 at 2-3. Plaintiffs argue that  
 18 in this case the § 1983 claims are being brought only against Defendants Berdecia, Cichowski,  
 19 Quinlan, and O’Donaghue in their personal and individual capacities. Dkt. 54, 2-3. Plaintiffs properly  
 20 cite *Hydrick v. Hunter*, for the proposition that “the Eleventh Amendment does not bar damage suits  
 21 against state officials in their *personal* capacity.” *Hydrick v. Hunter*, 2007 WL 2445998 (9th Cir.  
 22 August 30, 2007)(*internal citations omitted*)(*emphasis in original*). Accordingly, the Defendants  
 23 Motion for Summary Judgment for dismissal of the § 1983 claims against the individual Defendants  
 24 Berdecia, Cichowski, Quinlan, and O’Donaghue, in their personal and individual capacities, should not  
 25 be granted on this basis.

26 Moreover, when a State removes a case to federal court, the State waives its Eleventh  
 27 Amendment immunity from suit in federal court. *Embury v. King*, 361 F.3d 562 (9th Cir. 2004). The  
 28 waiver applies to both the state and federal claims. *Id.* Defendants here removed this action, and so

1 “voluntarily invoked the federal court’s jurisdiction.” *Id.* at 565. Accordingly, Eleventh Amendment  
2 immunity was waived.

### 3 C. QUALIFIED IMMUNITY FOR SECTION 1983 CLAIM

4 “[G]overnment officials performing discretionary functions generally are shielded from liability  
5 for civil damages insofar as their conduct does not violate clearly established statutory or  
6 constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457  
7 U.S. 800, 818 (1982). The immunity is “immunity from suit rather than a mere defense to liability.”  
8 *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

9 A private right of action does exist against government officials who, acting under the color of  
10 state law, violate federal constitutional or statutory rights. *Jackson v. City of Bremerton*, 268 F.3d  
11 646, 650 (9th Cir. 2001) *citing* 42 U.S.C. § 1983. A person can also be subject to §1983 liability for  
12 the acts of others in limited circumstances. “Although there is no pure *respondeat superior* liability  
13 under §1983, a supervisor is liable for the constitutional violations of subordinates ‘if the supervisor  
14 participated in or directed the violations, or knew of the violations and failed to act to prevent them.’”  
15 *Hydrick* at 6 (*citing Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989)). The Supreme Court has  
16 established a two-part analysis for determining whether qualified immunity is appropriate in a suit  
17 against an official for an alleged violation of a constitutional right. *Boyd v. Benton County*, 374 F.3d  
18 773, 778, (9th Cir. 2004) (*citing Saucier v. Katz*, 533 U.S. 194, 201 (2001)). A court required to rule  
19 upon qualified immunity must examine (1) whether the official violated the plaintiff’s constitutional  
20 rights on the facts alleged and (2) if there was a violation, whether the constitutional rights were  
21 clearly established. *Id.* (*internal citations omitted*). As to the first inquiry, where “no constitutional  
22 right would have been violated were the allegations established, there is no necessity for further  
23 inquiries concerning qualified immunity.” *Saucier* at 201.

#### 24 1. Violation of Constitutional Rights

25 Plaintiffs claim that the actions of the named Defendants were “deliberately indifferent to the  
26 Plaintiffs’ substantive due process rights to liberty, life, personal security, and bodily integrity.” Dkt.  
27 1-3, at 33-34. Plaintiffs argue that they have a cause of action against the individual Defendants  
28 pursuant to § 1983 under the state created danger theory. Dkt. 54, at 5. In light of the extensive



1 briefing and argument advanced by Plaintiffs regarding their § 1983 claim, the Court will construe  
2 these arguments as applying to both the § 1983 claims plead in the complaint.

3 It is well established that the Constitution protects a citizen's liberty interest in his own bodily  
4 security from state action without the due process of law. *Kennedy v. City of Ridgefield*, 439 F.3d  
5 1055, 1061 (9th Cir. 2006) (citing *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, 51  
6 L.Ed.2d 711 (1977); *Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir.1989)). However, "a State's  
7 failure to protect an individual against private violence simply does not constitute a violation of the  
8 Due Process Clause." *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 197  
9 (1989).

10 Nothing in the language of the Due Process Clause itself requires the State to protect  
11 the life, liberty, and property of its citizens against invasion by private actors. The  
12 Clause is phrased as a limitation on the State's power to act, not as a guarantee of  
13 certain minimal levels of safety and security. It forbids the State itself to deprive  
individuals of life, liberty, or property without "due process of law," but its language  
cannot fairly be extended to impose an affirmative obligation on the State to ensure that  
those interests do not come to harm through other means.

14 *Id.* at 195.

15 An exception to this general rule is known as the state created danger exception. The state's  
16 failure to protect an individual against private violence can violate the guarantee of due process where  
17 state action affirmatively places the plaintiff in a position of danger. *Kennedy* at 1061 (citing  
18 *DeShaney* at 197). "That is, where state action creates or exposes an individual to a danger which he  
19 or she would not have otherwise faced." *Id.* In the Ninth Circuit, there are two elements in deciding  
20 whether the state created danger exception applies: 1) danger affirmatively created due to state action  
21 and 2) the state official's deliberate indifference to a known or obvious danger. *Id.*

22 a. Danger Affirmatively Created Due to State Actions

23 In examining whether a governmental official affirmatively places an individual in danger, the  
24 Court does not look solely to the agency of the individual, nor rest the decision on what options may  
25 or may not have been available to the individual. *Id.* at 1062. Instead, the question is whether the  
26 official left the person in a situation that was more dangerous than the one in which they found him.  
27 *Id.* Here then, the issue is whether any affirmative action by Defendants Berdecia, Cichowski,  
28 Quinlan, and/or O'Donaghue placed G. M. T. in a situation that was more dangerous than the one in



1 which they found him. The undersigned concludes that there was none.

2 There is no Ninth Circuit authority which addresses a case similar to this one. The Ninth  
3 Circuit first considered the state created danger exception in *Wood v. Ostrander*, 879 F.2d 583 (9th  
4 Cir.1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990). In *Wood*, a police  
5 officer stopped a car, arrested the driver for drunk driving, impounded the car, and left the female  
6 passenger stranded alone in a high crime area. *Id.* The passenger was raped. *Id.* The Ninth Circuit  
7 found that a jury presented with the above could find that the police officer acted with deliberate  
8 indifference to Wood's interest in personal security under the fourteenth amendment. *Id.* They have  
9 subsequently found that plaintiffs alleged a triable danger creation claim in cases like *L.W. v. Grubbs*,  
10 974 F.2d 119 (9th Cir.1992) (holding that state employees could be liable under the state created  
11 danger exception for the rape of a registered nurse assigned to work alone in the medical clinic of a  
12 medium security prison with a known, violent sex offender after being assured that she would never  
13 work alone) and *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir.1997) (*per curiam*)(state  
14 created danger exception claim viable where police officers who, after finding plaintiff in grave need of  
15 medical care on his front porch, cancelled a 911 call for paramedics, put him back in his home, and  
16 locked him inside). The Ninth Circuit found in *Munger v. City of Glasgow Police Dep't*, 227 F.3d  
17 1082 (9th Cir. 2000) that police officers could be liable under the state created danger exception for  
18 the hypothermia death of a visibly drunk patron dressed in a t-shirt and jeans after officers ejected him  
19 from a bar on a bitterly cold night and told him not to drive anywhere. Similarly, in *Kennedy v. City of*  
20 *Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) the Ninth Circuit held that a police officer acted with  
21 deliberate indifference to an affirmatively created known danger to plaintiff. In *Kennedy* the police  
22 officer informed a known violent neighbor of plaintiff's allegations of child molestation without first  
23 warning plaintiff as the officer had promised to do. *Id.* The officer also promised to patrol plaintiff's  
24 neighborhood. *Id.* The Court held that the officer knew that telling the violent neighbor about the  
25 allegations against him without warning the plaintiff placed her in a danger she otherwise would not  
26 have faced. *Id.* at 1064. The neighbor shot the plaintiff and her husband that night. *Id.* In each of  
27 these cases the state took an affirmative action to place the plaintiff in danger or enhanced the danger.

28 These cases stand in contrast to *Johnson v. City of Seattle*, 474 F.3d 634 (9th Cir. 2007) and

1 *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002). In *Johnson*, plaintiffs who were assaulted by  
2 members of a riotous crowd at a Mardi Gras celebration were held not to have a § 1983 claim under  
3 the state created danger theory against the city, mayor, and police chief. *Id.* Plaintiffs argued that the  
4 city officials' decision to switch from a more aggressive operation plan for crowd control to a more  
5 passive one was not affirmative conduct that placed the plaintiffs in danger. *Id.*, at 641. The Ninth  
6 Circuit noted that plaintiffs voluntarily attended the event. *Id.* The Court held that the governmental  
7 actors did not create the dangerous conditions or expose plaintiffs to a situation in which was more  
8 dangerous than the one they found them. *Id.* In *Ruiz*, the Tenth Circuit held that plaintiff failed to  
9 state a § 1983 substantive due process claim against state officials for the improper licensing of a  
10 daycare. *Id.* There state officials failed to conduct a criminal background check of the in-home  
11 daycare providers or confirm that they had the requisite insurance pursuant to state regulations. *Id.*  
12 The daycare providers had an extensive history of domestic violence and did not have insurance. *Id.*  
13 The plaintiff's child was beaten to death. *Id.* The Tenth Circuit held that the plaintiff "failed to allege  
14 either any pertinent affirmative conduct on the part of the State Defendants or any conduct that  
15 'shocks the conscience,'" and so affirmed the District Court's dismissal of the complaint. *Id.* at 1183.

16 Here, as in *Johnson* and *Ruiz*, there is no evidence that the state took an affirmative action  
17 which placed G. M. T. in a situation that was more dangerous than the one in which they found him.  
18 The named Defendants did not require that G. M. T. attend Fish's daycare. The named Defendants  
19 did not take G. M. T. out of the custody of his parents and place him in the daycare. The only action  
20 taken by the above named Defendants was the decision to license and renew the license of the daycare  
21 which Plaintiffs contend was not in compliance with state regulations governing fencing for daycares.  
22 That action is simply not sufficient to prevail. *See Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir.  
23 2002). As was the case in *Johnson* and *Ruiz*, here there was no affirmative state action: no involuntary  
24 exposure to harm as a result of a state actor's command. None of the state created danger theory  
25 cases, cited by either party or that have been found to state a claim in the Ninth Circuit, include a case  
26 where the state's affirmative conduct was the licensing of a facility which arguably was in violation of  
27 a regulation. Plaintiffs have failed to demonstrate any violation of their constitutional rights caused by  
28 the named Defendants' actions here.

1 /

2 b. Deliberate Indifference

3 The second issue the Court must decide is the related issue of whether the danger to which the  
 4 government officials exposed G. M. T. was known or obvious, and whether they acted with deliberate  
 5 indifference to it. *Kennedy* at 1064. There is no evidence in the record that the named Defendants  
 6 took affirmative action to expose G. M. T. to a known or obvious danger. Accordingly, there is no  
 7 evidence in the record that any of the named Defendants acted with deliberate indifference.

8 2. Clearly Established Right

9 Even if the named Defendants had created or enhanced a known or obvious danger to G. M. T.  
 10 by licensing the daycare, they are entitled to qualified immunity if the right violated was not clearly  
 11 established. *Saucier* at 202. As to the second inquiry in the qualified immunity analysis, if the law did  
 12 not put the official on notice that his conduct would be clearly unlawful, summary judgment based on  
 13 qualified immunity is appropriate. *Saucier* at 202. As stated above, there is no Ninth Circuit  
 14 precedent similar to this case. Moreover, the Court notes that none of the parties cited a case for a  
 15 state created danger exception claim where the victim was injured by the unintentional acts of a third  
 16 party. Although the Tenth Circuit requires that the state's affirmative conduct also "shock the  
 17 conscience," unlike in the Ninth Circuit, *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064-1065  
 18 (9th Cir. 2006)(no requirement that the conscience of the federal judiciary be shocked in state created  
 19 danger cases), the named Defendants could have reasonably concluded pursuant to *Ruiz* that licensing  
 20 a daycare was not an "affirmative action" which could lead to a violation of the due process clause.  
 21 Even if Plaintiffs' constitutional rights were violated, Defendants Berdecia, Cichowski, Quinlan, and  
 22 O'Donaghue are shielded by qualified immunity from Plaintiffs' § 1983 claims. Defendants' Motion  
 23 for Summary Judgment on Plaintiffs' § 1983 claims should be granted and Plaintiffs' § 1983 claims  
 24 should be dismissed.

25 **D. STATE LAW CLAIMS AND ORDER TO SHOW CAUSE**

26 Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental  
 27 jurisdiction over a state law claims if (1) the claims raise novel or complex issues of state law, (2) the  
 28 state claims substantially predominate over the claim which the district court has original jurisdiction,

1 (3) the district court has dismissed all claims over which it has original jurisdiction, (4) in exceptional  
2 circumstances, there are other compelling reasons for declining jurisdiction. “While discretion to  
3 decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one  
4 of the conditions in § 1367(c), it is informed by the values of economy, convenience, fairness, and  
5 comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997)(*internal citations*  
6 *omitted*).

7 Here, two of the four conditions in § 1367(c) are present. As above, all Plaintiffs’ federal  
8 claims are dismissed by this order. Accordingly, this Court has “dismissed all claims over which it has  
9 original jurisdiction,” and so has discretion to decline to exercise supplemental jurisdiction over the  
10 state law claims under § 1367(c)(3). Moreover, the remaining state claims “raise novel or complex  
11 issues of state law” under § 1367(c)(1). For example, in order to determine whether Plaintiff’s  
12 negligence claims survive summary judgment, the undersigned would have to determine the proper  
13 interpretation of WAC 388-155-295(5)(dealing with required fencing around daycares to prevent  
14 access to water hazards). A determination for which the state court is uniquely suited. Accordingly,  
15 the values of economy, convenience, and comity may well be served by this Court’s declining to  
16 exercise supplemental jurisdiction. *See Acri* at 1001. Additionally, this Court would have to decide  
17 whether under Washington law, the state owed a duty to Plaintiffs. *Taylor v. Stevens County*, 111  
18 Wn.2d 159, 163 (1988). Under the public duty doctrine in the state of Washington, “no liability may  
19 be imposed for a public official’s negligent conduct unless it is shown that ‘the duty breached was  
20 owed to the injured person as an individual and was not merely the breach of an obligation owed to the  
21 public in general ( *i.e.*, a duty to all is a duty to no one).” *Id.* Washington recognizes “four  
22 exceptions to the public duty doctrine in which the governmental agency acquires a special duty of  
23 care owed to a particular plaintiff or a limited class of potential plaintiffs. These exceptions include (1)  
24 legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship.”  
25 *Babcock v. Mason County Fire District*, 144 Wn.2d 774, 786 (2001). Plaintiffs here argue that  
26 several of these exceptions apply. Dkt. 56. A further determination of the exact contours of these  
27 state specific exceptions would have to be made by the undersigned. Because state courts have a  
28 strong interest in enforcing their own laws, *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343,

352 (1988), the value of comity is served by this Court declining jurisdiction. The value of fairness is also served by having the matter remanded. The Court is aware that the Plaintiffs attempted to have the matter remanded, having already argued that the above determinations are best made in the state courts. The values of economy, convenience, and fairness are well served by this Court's declining to exercise supplemental jurisdiction.

Although "it is generally within a district court's discretion either to retain jurisdiction to adjudicate the pendent state claims or to remand them to state court," *Harrell v. 20<sup>th</sup> Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) in the interest of fairness, the parties should be given an opportunity to be heard on whether the case should be remanded. Parties should be ordered to show cause why the remaining state law claims should not be remanded to Pierce County Superior Court. Parties' briefs, if any, are due November 8, 2007. Parties briefs should not exceed three pages. Consideration of the parties' responses to the Order to Show Cause should be noted for November 9, 2007. In the meantime, Plaintiffs' Partial Motion for Summary Judgment (Dkt. 44), which is based entirely on state law, should be stricken, but may be renoted if the Court ultimately decides to exercise supplemental jurisdiction. Additionally, the portion of Defendants' motion for summary judgment dealing with Plaintiff's state law claims (Dkt. 41) should be stricken, but may also be renoted if the Court ultimately decides to exercise supplemental jurisdiction.

#### **E. MISCELLANEOUS MOTIONS**

##### **1. Defendant's Motion to Strike**

Defendants' Motion to Strike (Dkt. 61) should be granted, in part, and denied, in part. Defendants move to strike the Declaration of Paul Lindenmuth Re: Factual Background in Opposition to Defendants' Motion for Summary Judgment (Dkt. 52) as it contains testimony and argument. Federal R. Civ. P. 56(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

The Declaration in question does appear to contain testimony in violation of the rule. To the extent that there is testimony in the declaration, the testimony should be stricken. Plaintiffs request that in light of the Court's granting of their motion to file an overlength brief, the Declaration be

1 treated as a statement of facts to the two memorandums submitted in response to the motion for  
 2 summary judgment. Dkt. 68. The Court is now well aware of the door it opened when it entered the  
 3 order permitting the overlength briefs without specifying a page limit. To the extent that the  
 4 Declaration contains argument, which can be construed as a statement of facts, the motion to strike  
 5 should be denied.

6 Defendants also move to strike admission of all the attachments to Paul Lindenmuth's  
 7 Declarations (Dkts. 57, 58, and 59), arguing that many are irrelevant, are not properly authenticated  
 8 and are hearsay. Dkt. 61, at 8. For the purposes of these motions only, Defendants' motion to strike  
 9 the attachments should be granted, except for the attached deposition testimony. The remaining  
 10 attachments were often not referenced in either parties' motions, and so not relevant under Federal  
 11 Rule of Evidence 401. Many of the attachments were also unnecessary as several of the facts were  
 12 agreed upon. Accordingly, the Defendants motion to strike should be granted, in part, and denied, in  
 13 part.

14 2. Plaintiff's Motion for Late Filing of Exhibits #1 through 4 of Declaration of  
 15 Paul A. Lindenmuth Re: Plaintiffs' Motion for Summary Judgment /Allocation  
of Fault to Lisa Fish

16 Plaintiff's motion for the late filing of exhibits (Dkt. 66) should be granted. It appears that a  
 17 computer malfunction resulted in unintended consequences. The Court does note that the Declaration  
 18 is in support of a summary judgment motion regarding a state law issue. In light of the fact that this  
 19 Court is disinclined to exercise supplemental jurisdiction on the remaining state law claims, the motion  
 20 may well be moot.

21 **III. ORDER**

22 Therefore, it is hereby **ORDERED** that,

- 23 • Defendants' Motion for Summary Judgment (Dkt. 41) is **GRANTED, in the following**  
 24 **respect:** Plaintiffs' federal claims are dismissed; the portion of Defendants' motion for  
 25 summary judgment dealing with Plaintiff's state law claims is stricken, but may be renoted if  
 26 the Court ultimately decides to exercise supplemental jurisdiction,
- 27 • Defendants' Motion to Strike (Dkt. 61) is **GRANTED, IN PART, AND DENIED, IN**  
 28 **PART**, as above,

- 1 • Plaintiffs' Motion for Partial Summary Judgment Re: Parental Liability/Immunity;  
2 Contributory and/or Comparative Fault of a Minor Below the Age of 6 and Allocation of Fault  
3 Pursuant to RCW 4.22.070 (Dkt. 44) is **STRICKEN** but may be renoted if the Court  
4 ultimately decides to exercise supplemental jurisdiction,
  - 5 • Motion for Late Filing of Exhibits #1 through #4 of Declaration of Paul A. Lindenmuth re:  
6 Plaintiffs Motion for Summary Judgment Allocation of Fault to Lisa Fish (Dkt. 66) is  
7 **GRANTED**,
  - 8 • Parties are further **ORDERED TO SHOW CAUSE, IF ANY THEY HAVE, WHY** the  
9 Court should not decline to exercise supplemental jurisdiction and remand the matter to Pierce  
10 County Superior Court. Parties' briefs, if any, are due November 8, 2007. Parties briefs shall  
11 not exceed three pages. Consideration of the parties' responses to the Order to Show Cause  
12 shall be **NOTED** for November 9, 2007, and
  - 13 • The Clerk is directed to send uncertified copies of this Order to all counsel of record and to  
14 any party appearing *pro se* at said party's last known address.
- 15 DATED this 5<sup>th</sup> day of November, 2007.

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18 ROBERT J. BRYAN  
19 United States District Judge  
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